Supreme Court, U.S.
FILED

No. _____

00-879 SEP 25 2000

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IN THE

SUPREME COURT OF THE UNITED STATES

RIGOBERTO CASO,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

On Petition For Writ of Certiorari
To The Second District Court of Appeal

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fourth Amendment of the United States Constitution governing search and seizure is violated by a warrantless search conducted by a law enforcement agency during an investigatory stop, when such warrantless search was not supported by probable cause.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT OF THE UNITED STATES OF AMERICA

Rigoberto Caso respectfully petitions for a writ of certiorari to review the order of the Circuit Court of the Thirteenth Judicial Circuit In and For Hillsborough County, Florida.

OPINIONS BELOW

The order of the Circuit Court of the Thirteenth Judicial Circuit In and For Hillsborough County, Florida is not reported, and is lodged with the Clerk. The per curium affirmance of the Circuit Court's order by the Second District Court of Appeal is contained in the appendix attached hereto.

JURISDICTION

The Circuit Court of the Thirteenth Judicial Circuit In and For Hillsborough County, Florida entered its final order on December 15, 1999. The Second District Court of Appeal of Florida, which is here the state court of last resort, issued a per curium affirmance of a timely filed appeal on June 28, 2000.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the Constitution of the United States states as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be

STATEMENT OF THE CASE

The events leading to the state's acquisition of evidence which were the fruits of a warrantless search are as follows. Detective Leonard Diaz of the Hillsborough County Sheriff's Office arrested Benigno Rodriguez for Trafficking in Cocaine on June 16, 1998. In order to help himself, Rodriguez agreed to act as an informant for the Hillsborough County Sheriff's Office. Rodriguez stated that he had only one supplier and could contact his supplier by way of a pager and request a quantity of cocaine. A call was subsequently received by Rodriguez. Detective Diaz overheard "general conversation" and an agreement to meet at a U-Save grocery store parking lot at approximately 9:30 p.m. Rodriguez gave the detective a "general description" of the alleged supplier and advised that the suspect drove an "unknown make, maroon vehicle." Before the above listed interaction with law enforcement, Rodriguez had never been utilized in any prior investigations.

Detective Diaz positioned himself, with Rodriguez, in Rodriguez's car at the U-Save parking lot, supported by back-up units. Rodriguez, untrusted for safety reasons, was maintained in handcuffs. A red Hyundai automobile entered the parking lot, and Rodriguez identified it as his supplier's car. Rodriguez waived at the car and both Detective Diaz and Rodriguez yelled to the driver. The red Hyundai, driven by Mr. Caso, parked approximately 200 feet away, and Mr. Caso exited. Detective Padron testified that he saw Caso exit the Hyundai carrying a paper bag, and then saw him return the bag to the car, but failed to include this information on a police report, nor did he communicate the information to the case detectives or his supervisor at the time of the arrest. (R.83-86).[1]

As Caso walked in the direction of Detective Diaz and Rodriguez, he was immediately arrested by back-up Sheriff's detectives and the red Hyundai was simultaneously searched. (R.62-63, 71-73). The arrest of Mr. Caso and the search of his vehicle occurred solely because of the assertions of Rodriguez, a never before utilized informant. The search of Mr. Caso's automobile revealed approximately five ounces of cocaine within a brown paper bag in the passenger compartment. Following Mr. Caso's arrest, he was asked for and gave consent to the search of his residence. (R.64). The subsequent search revealed an additional quantity of cocaine. (R.65).

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1 References made to (R.___) are citations to the Second District Court of Appeals record.

As a result of the above, Rigoberto Caso, was charged via Information on July 2, 1998, with two counts of trafficking in cocaine; under Section 893.135(1)(b)1a and Section 893.135(1)(b)1b, Florida Statutes, respectively. On December 18, 1998, Mr. Caso filed a Motion to Suppress (App. 1)[2] alleging, among other matters, that the warrantless search conducted of his vehicle, was done without probable cause; and therefore, all evidence procured therefrom should be suppressed. Specifically, Mr. Caso's counsel argued the that Rodriguez's assertions had no reliability whatsoever. In fact, Rodriguez himself was being detained in handcuffs due to the fact that the officers felt that he was not trustworthy. The officers made no effort to determine Mr. Caso's identity prior to the search, and did not even ascertain whether he was in possession of a pager bearing Rodriguez's cell phone number. The vehicle was not capable of being moved, and there was more than adequate resources available to a major law enforcement agency to have a K-9 check outside of the vehicle. (R.89-90). There were no observations made of Mr. Caso when he exited his vehicle that constituted a crime. (R.91). The search was conducted prematurely; and therefore, it is in conflict with the existing Fourth Amendment criteria. (R.95).

Rodriguez's belief that Mr. Caso was in possession of cocaine did not satisfy the probable cause requirement to effect his arrest and/or the warrantless search of the automobile. Despite the clarity of the law on this issue, the trial court denied Mr. Caso's Motion to Suppress. Following the trial court's denial of his

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2 References made to (App. _) are to the appendix to this petition attached hereto.

Motion to Suppress (R.15-22) on April 26, 1999, and joint stipulation by the parties of the dispositive nature of the Motion to Suppress, on May 3, 1999, Mr. Caso pled Nolo Contendere, reserving his right to appeal. On July 9, 1999, Mr. Caso was sentenced to twenty years (20) imprisonment via the drug trafficking multiplier. On December 15, 1999, pursuant to Mr. Caso's Motion to Correct Calculation in Sentencing Guideline Score sheet under Rule 3.800(a), Fla.R.Crim.P., Mr. Caso was re- sentenced to 159.25 months of incarceration, and is currently serving said sentence. Mr. Caso did exercise his right to appeal to the Second District Court of Appeals, and that court entered a per curium affirmance of the trial court's ruling (App. 30)

REASONS FOR GRANTING THE WRIT

Granting certiorari will allow this Court the opportunity to re-emphasize the importance of the Fourth Amendment of the United States Constitution. Over the years, the prohibitions and protections against unlawful search and seizure have been eroded away by the alleged practicality of allowing warrantless searches in limited circumstances. Unfortunately, the "limited" circumstances have grown and have expanded to such an extent as to undermine the purpose of this Constitutional protection. The courts are continually turning blind eyes to this dilemma by accepting an ever expanding notion of what constitutes probable cause. The unlawfully seized evidence ensures convictions that may comport with public policy, but despite the end result, still are violations of one of the most sacred Constitutional rights.

This Court has recognized and has been part of the transition to a more lenient application of the Fourth Amendment. However, this Court has never failed to recognize the importance of constraints on the circumstances pursuant to which warrantless searches may be conducted. Although, there is a reduced expectancy of privacy concerning automobiles, which has broadened police powers to conduct automobile searches without warrants, there still must be probable cause to search a vehicle. *Alemida- Sanchez v. United States*, 413 U.S. 266 (1973); *United States v. Ortiz*, 422 U.S. 891 (1975); *Colorado v. Bannister*, 449 U.S. 1 (1980). As is concisely stated in Mr. Caso's Motion to Suppress and in his Initial Brief to the Second District Court of Appeal (App. 1: App. 11), the information provided by Rodriguez, the never before utilized confidential informant, could not possibly constitute the necessary probable cause to justify the warrantless search of Mr. Caso's vehicle. This position is wholly consistent with the prevailing law in the State of Florida, but was ignored by the trial court, and ultimately by the Second District Court of Appeals, resulting in a conviction that would not have existed but for a complete violation of Mr. Caso's Fourth Amendment rights.

This Court, long ago, has recognized that the tendency of those who execute the criminal laws of the country to obtain convictions by means of unlawful searches should find no sanction in the judgment of the courts which are charged at all times with the support of the Constitution. *Weeks v. United States*, 232 U.S. 383, 392 (1914). Chief Justice Warren wrote: "Courts which sit under the Constitution cannot and will not be made party to lawless invasions of the constitutional rights of

citizens by permitting unhindered governmental use of the fruits of such invasions...A ruling admitting evidence in a criminal trial...has the necessary effect of legitimizing the conduct which produced the evidence." *Terry v. Ohio*, 392 U.S. 1, 12, 13 (1968).

It is this Court's obligation to make sure that in the ever lessening constraints being exercised against warrantless searches, that the lower courts are not actively allowing themselves to be made parties to lawless invasions of the constitutional rights of citizens. Mr. Caso's case is a prime example of the above, and presents an opportunity for this Court to emphasize that the lower courts are subject to scrutiny for such behavior. Without this avenue of review, these violations will continue to occur by law enforcement, and will continue to be sanctioned by the lower courts, rendering the Fourth Amendment of the United States Constitution meaningless.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully Submitted

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APPENDIX

A. Motion To Suppress.....App. 1

B. Initial Brief.....App. 11

C. Second District Court of Appeal Per Curiam Affirmed.....App. 30

App. 1

IN THE CIRCUIT COURT OF THE THIRTEENTH,
JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY,
FLORIDA
CRIMINAL JUSTICE DIVISION

STATE OF FLORIDA,

Case No. 98-10505
vs.

Division "X"
REGOBERTO CASO,
aka ALEX LEAL.
_____/

MOTION TO SUPRESS
EVIDENCE AND STATEMENTS

The Defendant, **RIGOBERTO CASO** (Caso), by and through undersigned Counsel, moves this Honorable Court to Suppress Evidence and Statements Illegally Obtained, pursuant to Rule 3.190, Fla.R.Crim.P., and states the following in support thereof:

STATEMENT OF THE FACTS

1. Defendant is charged by way of Information with Count One, Trafficking in cocaine F.S.893.135(1)(b)1a; and Count Two, Trafficking in Cocaine, F.S.893.135(1)(b)1b.

2 The Criminal Report Affidavit indicates that the Defendant attempted to sell undercover detectives approximately 140 grams of cocaine at the U-Save store in the Town-N-Country area.

3. The Supplemental Investigation indicates that Leonard Diaz (Detective Diaz) and Detective Losat were working in an undercover capacity. Upon conducting an arrest of Benigno Rodriguez (Rodriguez), the suspect advised that his supplier was a subject known to Rodriguez as "Rigo." Rodriguez paged "Rigo." "Rigo" contacted Rodriguez via Rodriguez's cell phone and advised that he could be at the U-Save parking lot in approximately thirty minutes. Rodriguez advised that "Rigo" would be driving a maroon unknown make vehicle. Detective Diaz and the informant entered the U-Save parking lot and parked, at which time Detective Diaz was advised by the informant that his supplier was in fact driving around the area in a red Hyundai. Detective Diaz signaled to "Rigo" to approach him and the informant, at which time "Rigo" parked his vehicle. Upon parking and walking over to detective Diaz's vehicle, assisting detectives were advised by Diaz and the arrest of Caso was effected. Caso's vehicle was searched by Detective Diaz and a small brown paper bag containing suspected cocaine was located within the front seat of the vehicle. After the search, Detective Diaz read Miranda rights to Caso. Caso was asked if he had additional quantities of cocaine within his residence. Caso advised that he had additional quantities of cocaine within his apartment. Caso gave Detective Diaz an oral consent to search the apartment, where additional cocaine was located.

4. The deposition of Detective Leonard Diaz of the Hillsborough County Sheriff's Office, indicates that on June 16, 1998, Detective Diaz arrested Benigno Rodriguez for trafficking in cocaine. Rodriguez agreed to call his supplier. Detective Diaz was present when the informant paged his alleged supplier, who called back

and spoke with the informant on his cell phone. Detective Diaz did not monitor the conversation. Detective Diaz did not have any prior contact with the informant before his arrest. Upon entering the parking lot of the U-Save, the informant saw Caso. The informant waived to Caso, who eventually parked a ways from Detective Diaz's vehicle. Upon waling towards Diaz's vehicle, Caso was stopped and detained by assisting detectives. Caso was stopped approximately 150-200 feet from his vehicle and approximately the same distance from Detective Diaz's vehicle. Caso was not free to go when he was detained and Detective Diaz did not pat him down for weapons. Detective Diaz entered Caso's vehicle, which was searched by Lieutenant Davis, who found a brown paper bag containing cocaine. Following a search of his vehicle, Caso was officially arrested. Caso and the vehicle were taken behind the plaza where-he was read his Miranda rights and asked if he had any cocaine in his house. Caso did not sigh a waiver but agreed to allow the officers to search his apartment if they agreed not to arrest his wife. Detective Diaz agreed not to arrest Caso's wife and they proceeded to Caso's apartment where a search was conducted and contraband was located.

5. The deposition of Francis Losat (Detective Losat) of the Hillsborough County Sheriff's Office indicates that on June 16, 1998, Losat arrested Benigno Rodriguez. Detective Losat had never met Rodriguez before his arrest on June 16, 1998. Rodriguez paged "Rigo" and surveillance was set up at the U-Save parking lot. When "Rigo" arrived, park and exited his vehicle at the U-Save, other units detained Caso. Caso was detained because an alleged drug transaction was about to happen through the intelligence that they had gath-

ered over the prior two hours with the informant. Detective Losat had not previously met Caso. After Caso was detained, he was handcuffed and his vehicle was searched. Detective Losat did not personally pat Caso down for weapons. A search of the vehicle revealed cocaine. After the cocaine was located in Caso's vehicle, Detective Losat went to Caso's apartment where more contraband was located. Detective Losat did not locate any of the contraband but completed an inventory. The residence was secured and Caso was transported to Central Booking.

6. Detectives Diaz and Losat made no independent observations to support a founded suspicion that Mr. Caso had committed, was committing or was about to commit a crime.

7. The Officers did not have any personal knowledge concerning the alleged illegal activity and did not have the requisite probable cause necessary to arrest and search Caso's vehicle.

8. There was no probable cause to justify the June 16, 1998 arrest and search of Caso's vehicle.

9. The State has the burden of establishing probable cause to conduct a warrant less search.

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO SUPPRESS

Caso contends that because this was a warrant less search, the state has the burden to prove that the police officers had probable cause to search his vehicle either incident to a lawful arrest or as an investigatory search independent of the arrest. **Walker v. State**, 433 So.2d 644(Fla.2d DCA 1983); **Morales v. State**, 407 So.2d

321 (Fla. 3d DCA 1981). Caso submits that there is not competent substantial evidence in the record to authorize this search. A virtually unknown informant who provides uncorroborated information simply does not create probable cause to arrest a person such as Mr. Caso or to search his unoccupied car. Upon arriving at the scene, Detective Diaz neither observed nor did he wait to observe anything to make him reasonably suspect that Mr. Caso had violated or was violating any law. He saw no sign of suspicious behavior, drugs or weapons.

Under the standard announced in **Illinois v. Gates**, 462 U.S. 213, 103 S.Ct. 2317,76 L.Ed.2d 527 (1982), the quality and quantity of the information available to the police under all of the circumstances did not establish probable cause at the time Caso was arrested and the car was searched. Because the reliability of the source was a factor under these circumstances, the balancing test announced in **Gates** required additional evidence of a crime before this arrest and search could be conducted. "[V]eracity," "reliability," and "basis of knowledge" were all "highly relevant in determining the value" of an informant's report. **Gates**, 462 U.S. at 230.

The police may stop and detain an individual based upon information from a known and reliable informant when the information is sufficiently detailed. **State v. Flowers**, 566 So.2d 50 (Fla. 2d DCA 1990). In this case, Detective Diaz and Detective Losat arrested Benigno Rodriguez. The suspect told the police this his supplier was a suspect known only as "Rigo". Rodriguez paged someone. The police did not attempt to confirm that the pager number belonged to "Rigo" or ascertain who the pager number belonged to. Some-

one contacted Rodriguez via Rodriguez's cell phone. The police did not monitor the call and were not privy to that conversation. Moreover, the police did not confirm that the party calling was in fact "Rigo". The informant told the police that "Rigo" would meet him at the U-Save parking lot in approximately thirty minutes and that he would be driving a maroon unknown make. vehicle. Detective Diaz entered the U-Save parking lot and parked. The informant told Detective Diaz that his supplier was driving into the parking lot. Someone signaled to Caso. Caso parked and walked towards Detective Diaz's vehicle. Detective Diaz did not see Caso engaged in any illegal conduct. Assisting detectives arrested Caso approximately 150-200 feet before he reached Detective Diaz's vehicle and approximately 150-200 feet from his own vehicle. Caso's vehicle, which was at least 150-200 feet away at the time, was searched by police, without a search warrant and without consent.

Detectives Diaz and Losat arrested the informant immediately prior to his providing them with information concerning his supplier. The officers had no knowledge concerning the informant's veracity, reliability or basis of knowledge. See **Gates**, 462 U.S. at 230. There must be corroboration of information provided by an informant. **Robinson v. State**, 556 So.2d 450 (Fla.1st DCA 19990). Moreover, there must be independent evidence of criminal activity apart from the otherwise verified information to support a search of the described suspect. **Cunningham v. State**, 591 So.2d 1058 (Fla. 2d DCA 1991). In this case, the police officers made no independent observations to support a founded suspicion that Mr. Caso had committed, was committing or was about to commit a crime. And there

is not evidence to support a contention that the officers were concerned for their safety. See **Blair v. State**, 563 So.2d 824 (Fla. 2d DCA 1990). The quality and quantity of the information available to the police under all of the circumstances did not establish probable cause to arrest Caso and search his vehicle. Additional evidence of a crime was required before this arrest and search could be conducted. See **Miller v. State**, 613 So.2d 135 (Fla. 2d DCA 1994).

In **Lawal v. State**, 666 So.2d 1000 (Fla. 2d DCA 1996), Lawal appealed the trial court's denial of is motion to suppress evidence seized during the search of is vehicle. The Second district Court of Appeal reversed because toe officers did not have probable cause to arrest Lawal or to search the vehicle. In **Lawal** the police arrested an informant for possession of marijuana and he agreed to cooperate with police. The informant called an unknown individual and said he needed "two of those." He told the officers to go to a grocery store and wait for a vehicle to pull up next to them. They were to wait fro a black male of Jamaican descent by the name of Jimmy. Jimmy would pull up close to the officers' car so that the transaction could be made through the car windows. No description of the person or the vehicle was given. Officers took the informant's vehicle to the store. A van with two black males pulled in and parked next to the informant's vehicle. When the officer rolled down his window, Lawal asked, "What's up?" The officer replied that his companion was in the store and would be out in a minute. Lawal then said, "Okay." No further conversation took place. Approximately two minutes later backup units arrived. Lawal was arrested, the van was searched, and two baggies of marijuana were found.

Lawal was charged with possession and delivery of marijuana. The Second district court of Appeal reversed Lawal's convictions because the information given to the officers was not sufficiently detailed and was not corroborated. Therefore, the officers did not have probable cause to arrest Lawal or to search his vehicle. The court held that in determining whether information given by an informant will give an officer probable cause for a warrant less arrest and search, the totality of the circumstances must be weighed, including the veracity of the informant, the amount of details in the tip, and corroboration of the details by the officers. **Lawal**, id. See also **State v. Butler**, 655 So.2d 1123 (Fla. 1995).

In this case, the informant was not known and had not been used by the officers before. He was an arrestee who was cooperating with the police for his won benefit. He made the arrangements for the officers to meet the suspect by telephone, and the officers only heard his side of the conversation, which was very brief. In addition to having an informant of questionable reliability, the information itself contained very little detail. The officers were told to park in a particular area of the U-Save parking lot and wait for "Rigo", who would be driving a maroon unknown make vehicle. After pulling into the parking lot, the informant waived to someone in a red Hyundai, who parked and walked toward the officer's vehicle. There was no conversation between Caso, the informant or the police. Caso was simply arrested and is vehicle was searched. Under the totality of circumstances, including the questionable reliability of the informant, the lack of details in the information, and the lack of corroboration, the officers did not have probable cause to arrest Caso or to search his vehicle. See **Miller**, supra. See also, **Lawall**, supra.

Moreover, where the initial detention is invalid, all

that flows from it is also illegal. Thus, the subsequent seizure at Caso's apartment is invalid and the items of evidence should be suppressed. **Ottney v. State**, 571 So.2d 20 (Fla. 2d DCA 1990). Additionally, statements given during a period of illegal detention are inadmissible even though voluntarily given if they are the product of the illegal detention and not the result of an independent act of free will. **Dunaway v. New York**, 442 U.S. 200, 218-219, 99 S. Ct. 2248, 2259-2260 (1979); **Brown v. Illinois**, 422 U.S. 590, 45 L. Ed. 2d 416, 95 S. Ct. 2254, 601-602, 95 S. Ct. 2254, 2260-2261 (1975). The evidence and statements obtained as a result of Caso's illegal arrest is tainted as "fruit of the poisoned tree," **Wong Sun v. United States** 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963), and therefore should be suppressed.

WHEREFORE, the statements and evidence in question were seized in violation of the Fourth Amendment's general proscription against unreasonable searches and seizures and should be excluded as the fruits of the poisonous tree. Accordingly, the Defendant respectfully moves this Honorable Court to suppress the statements and evidence obtained as the result of his unlawful arrest.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing motion to suppress and memorandum of law has been provided by regular U.S. Mail to Mark S. Makholm, Assistant State Attorney, 800 E. Kennedy Boulevard, Tampa, Florida 33602, on this 15thday of December, 1998.

_____

JESSE V. DOMINGUEZ, Esquire

IN THE SECOND DISTRICT COURT OF APPEAL
LAKELAND, FLORIDA

RIGOBERTO CASO)
Defendant/ Appellant,)
)
Fla. 2d DCA.
v.)
Case No. 99-3178
)
STATE OF FLORIDA)
Lower Tribunal
Plaintiff/ Appellee.)
Case No. 98-10505X
_____)

APPEAL FROM THE CIRCUIT COURT,
CRIMINAL DIVISION, OF THE
THIRTEENTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA
IN AND FOR HILLSBOROUGH COUNTY

APPELLANT'S INITIAL BRIEF

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STATEMENT OF THE CASE AND FACTS

The Appellant, Rigoberto Caso, was charged via Information on July 2, 1998, with Count One, Trafficking in Cocaine; and Count Two, Trafficking in Cocaine; under Section 893.135(1)(b)1a and Section 893.135(1)(b)1b, Florida Statutes, respectively. R. 9-12. Following the trial court's denial of his Motion to Suppress (R.15-22) on April 26, 1999 (R. 5, 96-98) and joint stipulation by parties of the dispositive nature of the Motion to Suppress (R. 23-24, 98-99), the Appellant pled Nolo Contendere, reserving his right to appeal, on May 3, 1999 (R. 5, 23-24). The Appellant was subsequently sentenced to twenty years (20) imprisonment , via the drug trafficking multiplier, on July 9, 1999. R. 133-134. On December 15, 1999, pursuant to his Motion to Correct Calculation in Sentencing Guideline Scoresheet under Rule 3.800(a), Fla.R.Crim.P., the Appellant was re-sentenced to 159.25 months of incarceration (multiplier re-applied) and is presently serving said sentence. (Supplemental Record to follow).

The events leading to the state's acquisition of evidence against the Appellant in this case are as follows: Detective Leonard Diaz of the Hillsborough County Sheriff's Office arrested Benigno Rodriguez for Trafficking in Cocaine on June 16, 1998. R.56, 67, 69. Post arrest, Rodriguez stated that he had only one supplier and could contact his supplier by way of a pager and request a quantity of cocaine. R. 56-57. Rodriguez was instructed to page the alleged supplier with a call back number and a numeral "5", indicating

a specific quantity of cocaine. R. 57. A call was subsequently received by Rodriguez. Detective Diaz overheard "general conversation" and an agreement to meet at a U-Save grocery store parking lot at approximately 9:30 p.m. R. 58-59. Rodriguez gave the detective a "general description" of the alleged supplier and advised that the suspect drove an "unknown make, maroon vehicle." R. 58, 70. Before the above listed interaction with law enforcement, Rodriguez had never been utilized in any prior investigations. R. 69.

Detective Diaz positioned himself, with Rodriguez, in Rodriguez's car at the U-Save parking lot, supported by back-up units. R. 59. Rodriguez, untrusted for safety reasons, was maintained in handcuffs. R. 69. A red Hyundai automobile drove on to the lot and Rodriguez identified it as his supplier's car. R. 60. Rodriguez waived at the car and both Detective Diaz and Rodriguez yelled to the driver. R.60-61,71. The red Hyundai, driven by Caso, parked approximately 200 feet away, and Caso exited. R. 60-62. Detective Padron testified that he saw Caso exit the Hyundai carrying a paper bag, and then saw him return the bag to the car. R. 81-82. Detective Padron did not include the information in a police report, nor did he communicate the information to the case detectives or his supervisor. R. 83-86.

As Caso walked in the direction of Detective Diaz and Rodriguez he was arrested by back-up Sheriff's detectives and the red Hyundai was simultaneously searched. R. 62-63, 71-73. The search revealed approximately five ounces of cocaine within a brown paper bag in the passenger compartment. R. 63. Following Caso's arrest, he was asked for and gave consent to a search of his residence. R. 64. The subsequent

search revealed an additional quantity of cocaine. R. 65.

Prior to the hearing of the Appellant's motion to suppress, the Appellant entered into a verbal cooperation agreement with the State. R. 103. The agreement provided for a maximum sentence of fifty-six months incarceration, low end of sentencing guidelines without the application of the drug trafficking multiplier. R.103. The Appellant later maintained that he was unable find a target for law enforcement pursuant to the substantial assistance opportunity and proceeded forward with his defense. R. 123. At sentencing, the law enforcement case agent testified, over the defense's objection, as to intelligence information concerning the Appellant's role in drug activities. R. 105-113. The detective asked the judge for a high guideline sentence because the Appellant "could have helped himself," but didn't. R. 132. The court applied the drug trafficking multiplier. R. 133.

SUMMARY OF THE ARGUMENTS

The State failed to meet its burden to prove that police officers had probable cause to conduct a warrantless search of the Appellant's automobile either incident to a lawful arrest or as an investigatory search independent of arrest. Although a reasonable suspicion may have existed for an investigatory stop, officers proceeded prematurely to a higher level of intervention, arrest and search, without probable cause. Also, the subsequent seizure at the Appellant's residence, via his verbal consent to search obtained during an illegal arrest, was tainted as "fruit of the poisoned tree." Therefore, the trial court's denial of the Appellant's motion to suppress should be reversed.

In the alternative, it was an abuse of discretion to apply the drug trafficking multiplier at sentencing, where the Appellant was a candidate for substantial assistance and was simply penalized for being unsuccessful. The Appellant's case should be remanded for sentencing without application of the drug trafficking multiplier.

ARGUMENTS

(a) STANDARD OF REVIEW/MOTION TO SUPPRESS

Review of a motion to suppress in Florida is a mixed question of law and fact, yoked to federal law. Art. I, Sec. 12, Fla. Const.; Perez v. State, 620 So.2d 1256 (Fla.1993). The standard of review for a trial judge's factual findings is whether competent substantial evidence supports the judge's ruling. Butler v. State, 706 So 2d 100, 101 (Fla. 1st DCA 1998).. The standard of review for the trial judge's application of the law to the factual findings is de novo. Id.; Ornelas v. United States, 517 U.S. 690, 116 S. Ct. 1657, 134 L.Ed. 2d 911 (1996).

(b) THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION TO SUPPRESS

The Appellant now urges this Court to reverse his judgment and sentence because the trial court erred in denying his Motion to Suppress. He contends that because the seizure stemmed from a warrantless search, the State failed to meet its burden to prove that police officers had probable cause to search his automobile either incident to a lawful arrest or as an investigatory search independent of the arrest. A virtually unknown informant who provides uncorroborated information simply does not create probable cause to arrest a person such as the Appellant, or to search his unoccupied automobile.

In State v. Butler, 655 So. 2d 1123, 1126, (Fla.1995) , the Florida Supreme Court provided a comprehensive analysis of search and seizure issues, including informant veracity:

> The "veracity" prong of the Aguilar test was usually established by the prior record of the informant in providing reliable tips that proved accurate. See,e.g., McCray v. Illinois, 386 U.S. 300, 87 S. Ct. 1056, 18 L. Ed. 2d 62 (1967) (officer testified that he had been acquainted with informant for about a year and that during this period informant had supplied him with information 15 or 16 times which resulted in numerous arrests and convictions; another officer also testified that he had used the same informant 20 to 25 times which led to many convictions)....

The Court traced the transition of search and seizure law to the present day totality of the circumstances analysis announced in Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 3217, 76 L. Ed. 2d 527 (1983). Under Gates, "veracity" and "basis of knowledge," although still highly relevant considerations, are no longer viewed as independent prerequisites to a finding of probable cause: "A deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability" such as corroborating evidence gathered by law enforcement. 462 U.S. at 233, 103 S. Ct. at 2329, 76 L. Ed. 2d at 545; Butler at 1128.

Because the informant in the case at bar was of questionable reliability and had not been used by law enforcement before, and in fact was an arrestee cooperating for his own benefit, the central question is whether the brief police activity articulated in the suppression hearing constituted corroborating evidence or probable cause that the Appellant possessed cocaine on his person or in his automobile.

In Lawal v. State, 666 So. 2d 1000 (Fla. 2d DCA 1996), this Court reversed a conviction under similar, although not identical facts, after weighing the totality of the circumstances, including the questionable reliability of the informant, the lack of details in the tip and the lack of corroboration of details by the officers. In Lawal law enforcement arrested a person who contemporaneously agreed to cooperate. The informant then called an alleged supplier and said he needed "two of those." Officers heard only the informant's side of the

conversation. The informant directed the officers to go to a grocery store parking lot and wait for a vehicle to pull up next to them. The officers were to look for a black male of Jamaican descent named Jimmy. Jimmy would pull up close to the officers' car so that the transaction could be made through the car windows. No description of the person or the vehicle was provided. Officers took the informant's vehicle to the grocery store. The informant was maintained in custody, obviously because of his questionable reliability. A van occupied by two black males pulled into the lot and parked next to the informant's vehicle. When the officer rolled down his window, Lawal asked, "What's up?" The officer replied that his companion (informant) was in the store. Lawal then said, "Okay." Shortly thereafter, Lawal was arrested, the van was searched and two baggies of marijuana were found.

Like Lawal, the case sub judice, involves an informant of questionable reliability.[1] Also, the tip contained little detail: an alleged supplier named Rigo, Spanish descent, of a "general" description, utilizing a beeper and driving an unknown make, model or style, maroon vehicle, transporting cocaine. Moreover, as applied in Lawal, under the Gates analysis, of key importance is the issue of lack of police corroboration of the details of the tip.

Equally of significance is the level of police intervention justified under the circumstances. For example, in State v. Evans, 620 So 2d 802 (Fla. 2d DCA 1993), an untested informant told a deputy sheriff that in thirty minutes a specifically named white male would leave a specific house in Bonita Springs, carrying a quantity of marijuana to transport to Naples, Florida, in one of two specifically described cars

parked in front of the house. A deputy went to the location, which conformed to the description. The deputy observed a white male come out of the house, carrying a package. The man and a companion entered one of the cars and took the interstate toward Naples. The deputy made an investigatory stop and procured a consent to search. The Court upheld the **investigatory stop** based upon reasonable suspicion. Unlike Evans, the case at bar must surpass a higher hurdle: **probable cause** for an arrest and search. The Evans court distinguished the case relied upon by the defense, United States v. Solomon, 728 F. Supp. 1544 (S.D. Fla. 1990), stating: AAlthough the facts in Solomon are somewhat similar to those in the present case, Solomon involved an arrest rather than a Terry stop. Evans at 803.

In Alabama v. White, 496 U.S. 325, 329-330, 110 S. Ct. 2412, 2416, 110 L. Ed. 2d 301 (1990), the United States Supreme Court stated:

Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quality or content than required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause.

A good example of the above distinction is State v. Miranda, 701 So. 2d. 424 (Fla. 3d DCA 1997). In Miranda, a Metro-Dade Police Department detective received information from an untested informant that a one armed white Latin male in his fifties would arrive that day in a taxi at a particular Denny's Restaurant between 7:30 p.m. and 8:00 p.m. and would be carrying five ounces of cocaine. At the appointed time, detec-

tives responded to the location and observed Miranda, who matched the description, already standing on the restaurant's sidewalk. Detectives approached Miranda, told him that they had received information that he was in possession of cocaine and obtained a consent to search. In Miranda's pocket the detectives discovered a plastic bag with five ounces of cocaine. The Third District Court of Appeal held that the informant's information that a specifically described individual would arrive at a specific restaurant at a specific time, and would be carrying an amount of cocaine, justified an **investigatory stop.**

In the instant case, police observed the placement of a beeper page to an alleged supplier by an untested informant, including the placement of a numeral alleged to designate a quantity of cocaine. Only general conversation was overheard during the call back. No effort was made to identify the subscriber to the beeper number. Waiting for an unknown make, model or style, maroon colored vehicle, police observed a red Hyundai arrive at the grocery store parking lot at approximately the designated time. The informant, handcuffed, waived down the car .[2] The informant and the Detective also yelled to the driver who parked approximately 200 feet away. The driver was identified by the informant as his supplier. At a point, a surveillance unit observed the driver with a paper bag.[3] As the driver walked in the direction of the informant's vehicle he was arrested and his vehicle was simultaneously searched before his identity was ascertained, his voice identified or even verification that he was carrying a beeper.[4]

The cornerstone of the Appellant's argument is that at the <u>exact point</u> in time that he was arrested, and

his automobile searched, only the following facts existed: (1) He drove-up at the specified place at approximately the specified time, (2) in an automobile vaguely described by the informant, (3) he matched the "general" description given by the informant, (4) he was seen with a paper bag,[5]
(5) he was identified as a drug supplier by the informant and (6) the informant, whose reliability was questionable, believed the Appellant was in possession of cocaine. It is abundantly clear from the facts that the informant had no specific knowledge (i.e., observation) that the Appellant was in possession of cocaine or any illegal substance. There was no at-scene, pre-arrest conversation with the Appellant. Courts have repeatedly held that unsupported assertion or belief does not satisfy the probable cause requirement. As stated by the United States Supreme Court in Aguilar v. Texas: "For all that appears, the source here merely suspected, believed or concluded that there were narcotics in petitioner's possession." 378 U.S. 108, 113, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964); Accord State v. Butler, 655 So. 2d 1123 (Fla. 1995). Here, the lack of police corroboration, as in Lawal, is fatal when the totality of circumstances analysis is applied for probable cause.

Assuming, arguendo, a founded suspicion for an investigatory stop existed, the case detective testified to the availability of drug detection K-9's, which easily could have been utilized outside of the Appellant's car.[6] However, that or other investigative steps were discounted. Using abbreviated investigative techniques,
officers proceeded immediately to a high level of intervention: **arrest and search**.[7]

Furthermore, where the initial detention is

invalid, all that flows from it is also illegal. Ottney v. State, 571 So 2d 20 (Fla. 2d DCA 1990). Thus, the subsequent seizure at the Appellant's residence is invalid and the items seized should have been suppressed. Additionally, statements given during a period of illegal detention are inadmissible even though voluntarily given if they are the product of the illegal detention and not the result of an independent act of free will. Dunaway v. New York, 442 U.S. 200, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979), Brown v. Illinois, 422 U.S. 590, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975). The evidence and statements obtained as result of the Appellant's illegal arrest were tainted as "fruit of the poisoned tree," Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963), and therefore should have been suppressed.

THE TRIAL COURT ABUSED ITS DISCRETION IN APPLYING THE DRUG TRAFFICKING MULTIPLIER DURING SENTENCING

The Appellant was sentenced under the 1994 revision of the sentencing guidelines. As to sentencing multipliers, specifically drug trafficking, Fla. Stat. sec. 921.0014(1)(b) (1999) states:

If the primary offense is drug trafficking under s. 893.135, the subtotal sentence points are multiplied, **at the discretion of the court**, for a level 7 or 8 offense, by 1.5. (Emphasis added)

An eloquent description of judicial discretion is found in Matire v. State, 232 So. 2d 209 (Fla. 4th DCA 1970):

Judicial discretion does not imply that a court may act, or fail to act, according to mere whim or ca-

price of the presiding judge, but it means a discretion exercised within the limits of the applicable principles of law and equity, and the exercise of which, if clearly arbitrary, unreasonable, or unjust, when tested in the light of such principles, amounting to an abuse of such discretion, may be set aside on appeal.

(quoting Carolina Port Cement Co. V. Baumgartner, 99 Fla. 987, 128 So. 241, 247 (1930))

In the case at bar it was manifestly unjust to apply the drug trafficking multiplier to a defendant who maintained he was unable to find a target for law enforcement even though law enforcement claimed that the defendant should have been able to do so. Most telling as to the circumstances at sentencing was the case agent's testimony: "I wouldn't have been here asking for his ... higher sentence guidelines if I didn't honestly think he could have helped himself."[8] The recitation of intelligence information concerning the Appellant's alleged role in drug activities was simply a mechanism to justify the underlying motivation of punishing the Appellant for not being successful with cooperation. The trial court adopted the detective's opinion and sentenced the Appellant to twenty (20) years imprisonment.[9]

It is dangerous ground and invites many ills to sanction the enhanced punishment of a substantial assistance candidate who declares that he is unable to provide a case to law enforcement.[10] See State v. Embry, 563 So. 2d 147 (Fla. 2d DCA 1990), quashed, 588 So. 2d 995 (Fla. 1991).

Therefore, the application of the multiplier was an abuse of discretion under these circumstances and the Appellant's case should, in the alternative, be remanded for sentencing without application of the multiplier.

CONCLUSION

Based on the foregoing, the Appellant respectfully requests that his Honorable Court reverse the trial court's denial of his Motion to Suppress and because of the dispositive nature of said Motion to Suppress, thereby reverse his convictions.

In the alternative, the Appellant respectfully requests that his case be remanded for sentencing without application of the drug trafficking multiplier.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by U.S. Mail to the Office of the Attorney General, 2002 N. Lois Avenue, Ste. 700, Tampa, Florida 33607-2366, on this _____ day of December, 1999.

John Cuesta III, Esquire

[1] Defense Counsel: In fact, you didn't trust Mr. Rodriguez because you had him handcuffed in the car?

Detective Diaz: Correct. R. 69. See also, R. 80.

[2] R. 71.

[3] " Whenever an officer recalls a detail on the witness stand that is not in his or her arrest report, the officer's credibility becomes a significant issue." Revels v. State, 666 So. 2d 213 (Fla. 2d DCA 1995).

[4] Detective Diaz: The vehicle was being searched at the point where I and other detectives were making the initial contact [with Caso].R. 72-73.

[5] See Note 3, supra.

[6] R. 74.

[7] The Court: The defendant was observed exiting the vehicle and ...coming forward [to] the vehicle where law enforcement ...and the informant were seated. **At that time the signal was given for arrest.** (Emphasis added) R. 97.

[8] R. 132.

[9] Court: Based on the totality of the evidence it is clear the defendant failed to provide substantial assistance even though having the opportunity to do so. It is clear the defendant was responsible for bringing kilo amounts of cocaine into this community on several occasions. Therefore, I will impose the multiplier of drug trafficking.... R. 133.

[10] The Florida Department of Corrections, Presentence Investigation recommended that the Appellant be sentenced to 90 months Florida State Prison. R. 48.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL OF FLORIDA SECOND DISTRICT

RIGOBERTO CASO,

Appellant,

v.

STATE OF FLORIDA,

Appellee,

Case No. 2D99-3178

Opinion filed June 28, 2000.

Appeal from the Circuit Court for Hillsborough County; Jack Espinosa, Jr., Judge.

John Cuesta of Caltagirone & Cuesta, Tampa, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Patricia E. Davenport, Assistant Attorney General, Tampa, for Appellee.

PER CURIAM.

Affirmed.

PARKER, A.C.J., and CASANUEVA and SALCINES, JJ., Concur.